Supreme Court, U.S.
FILED
APR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NIMROD MARKETING (OVERSEAS) LTD.
AND TOM ANDERSON-SLIGHT,
Cross-Petitioners,

v.

TEXAS ENERGY INVESTMENT CORP. AND
ADVANCED TECHNOLOGY, LTD.,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

DANA G. KIRK*
KENNETH B. COLE, JR.
3900 One Shell Plaza
900 Louisiana
Houston, Texas 77002
(713) 228-7210
*Counsel of Record
Attorneys for Cross-Respondents

Of Counsel:
KIRK & CARRIGAN, P.C.

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW IN CROSS-PETITIONERS' CROSS-PETITION FOR WRIT OF CERTIORARI	1
The Judgment Day Rule Is Applicable	2
The Exchange Rate In Effect on the Date that the Corrected Judgment is Entered Should Be Used	3
Interest Should Accrue as of the Date the District Court Enters Its Corrected Judgment	4
CONCLUSION	5

TABLE OF AUTHORITIES

CASES

	Page
Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 46 S. Ct. 166 (1926)	2, 3
In Re: Good Hope Chemical Corp., 747 F.2d 806 (1st Cir. 1984)	2
Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp., 769 F.2d 1076 (5th Cir. 1985)	4
Texas Energy Investment Corp. and Advanced Technology, Ltd. v. Nimrod Marketing (Overseas) Ltd. and Tom Anderson-Slight, Cause No. 85-1164 (U.S. Oct. Term 1985)	4
Zimmerman v. Southerland, 274 U.S. 253, 47 S. Ct. 625 (1927)	3

UNITED STATES STATUTES

28 U.S.C. § 1961	5

SUPREME COURT RULES

Rule 49	5

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 37	5

TEXTS

5 A.L. Corbin, *Corbin on Contracts*, § 1005 (1964)	3

NO. 85-1333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NIMROD MARKETING (OVERSEAS) LTD.
AND TOM ANDERSON-SLIGHT,
Cross-Petitioners,

v.

TEXAS ENERGY INVESTMENT CORP. AND
ADVANCED TECHNOLOGY, LTD.,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW IN CROSS-PETITIONERS' CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners present the issues of whether the breach day rule or the judgment day rule is applicable in this case; whether the rate of exchange used pursuant

to the judgment day rule should be the rate in effect at the time of the original or at the time of the corrected judgment; and whether post-judgment interest should be allowed from the date of the original judgment or the date of the corrected judgment.

The Judgment Day Rule Is Applicable

Cross-petitioners argue that the rate of exchange in effect on the date of breach should be applied in this lawsuit. Cross-petitioners already set forth the same argument before the Fifth Circuit in their Petition for Rehearing. Cross-petitioners' reliance on the decision of the First Circuit Court of Appeals in *In Re: Good Hope Chemical Corp.*, 747 F.2d 806 (1st Cir. 1984), is misplaced.

The facts in *Good Hope* are distinguishable from the facts in this case and, as the Fifth Circuit decided on August 30, 1985, cross-petitioners' reasoning regarding exchange rates is, therefore, inappropriate. In *Good Hope,* the involved companies were American and West German, and the parties agreed that the contracts gave rise to a cause of action under American law. *Id.* at 807, 812. In the instant case, however, the contracts giving rise to cross-petitioners' alleged obligation to pay cancellation charges were between British companies. The obligation to pay cancellation charges, therefore, arose under British law and, as found by the trial court, Nimrod was entitled to recover a fixed amount of 186,288 British pounds sterling. FFCL, Rec. V. p. 26. The *Good Hope* holding, therefore, is not applicable, and the Fifth Circuit's decision to apply the exchange rate in effect on the date that the district court enters the corrected judgment is appropriate. *Die Deutsche*

Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 46 S. Ct. 166 (1926); *Zimmerman v. Southerland,* 274 U.S. 253, 47 S. Ct. 625 (1927); 5 A.L. Corbin, *Corbin on Contracts,* § 1005 (1964).

Additionally, application of the exchange rate on the alleged date of breach would result in a windfall to cross-petitioners because they would receive more dollars than necessary to buy the pounds needed to pay the alleged cancellation charges. Equity dictates that cross-petitioners receive only that amount of dollars necessary to purchase the requisite number of pounds. Since that number of pounds is fixed, and since cross-petitioners have paid no money to any company to date, the only fair method of payment would be by applying the exchange rate in effect on the date the district court enters its corrected judgment.

The Exchange Rate In Effect on the Date that the Corrected Judgment is Entered Should Be Used

Cross-respondents cannot state more clearly or succinctly than did the Fifth Circuit the legal and equitable principles which dictate that the exchange rate in effect on the date of the corrected judgment is entered by the district court is the exchange that should be used in this lawsuit. Cross-respondents, therefore, respectfully direct this Court's attention to the following language from the Fifth Circuit's Opinion in this lawsuit:

> Recovery under the theory of promissory estoppel is limited to "the amount necessary to compensate that party for a loss already suffered." *Sun Oil Co. v. Madeley,* 626 S.W.2d 726, 734 (Tex. 1981);

> *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965). One recovering under promissory estoppel should not be penalized, nor should one experience a windfall. The contracts call for Nimrod to pay most of the cancellation damages in British pounds sterling. Nimrod has not yet paid those debts and to be made whole should receive the amount in dollars that will purchase the precise number of pounds required for those payments. To avoid both penalty and windfall the court should direct payment in dollars convertible from British pounds sterling based on the exchange rate on the date the corrected judgment is entered.

Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp., 769 F.2d 1076, 1080 (5th Cir. 1985). This conclusion is made even more inescapable because of the fact that cross-respondents' rightful and justifiable pursuit of the legal rights to which they are entitled should not serve as a basis to, in essence, punish cross-respondents.

Interest Should Accrue as of the Date the District Court Enters Its Corrected Judgment

The Fifth Circuit specifically stated in its Order Denying the Petitions for Rehearing in this lawsuit that the assessment of interest should begin from the date of entry of the corrected judgment. *See* Appendix B to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, filed previously with this Court by cross-respondents [petitioners] in *Texas Energy Investment Corp. and Advanced Technology, Ltd. v. Nimrod Marketing (Overseas) Ltd. and Tom Anderson-Slight,* Cause No. 85-1164 (U.S. Oct. Term 1985). The Fifth Circuit's position in this regard is supported by the statutes of the United States and by the Federal Rules of Appellate Procedure and applicable case law.

Section 1961 of Title 28 states that "interest shall be calculated from the date of the entry of the judgment." 28 U.S.C. § 1961. Pursuant to both Supreme Court Rule 49 and Federal Rule of Appellate Procedure 37, if an appellate court modifies or reverses a judgment with a direction that a judgment for money be entered in the district court, then the mandate shall contain instructions with respect to allowance of interest. The Fifth Circuit has done exactly what Rule 37 dictates it should have done. The reasoning behind this decision is clear. Cross-respondents should not be punished by the imposition of post-judgment interest from January 26, 1984, simply because cross-respondents have rightfully and in good faith pursued their legal rights in this lawsuit pursuant to the proper appellate channels in the American judicial system. The proper date for post-judgment interest to begin accruing, therefore, should be the date that the district court enters its corrected judgment pursuant to the decision rendered by the United States Supreme Court.

CONCLUSION

For the above stated reasons, cross-respondents assert that the rate of exchange should be determined as of the date that the corrected judgment is entered in this lawsuit by the United States District Court for the Southern District of Texas, and that any post-judgment interest

that may accrue should begin accruing as of that same date.

Respectfully submitted,

KIRK & CARRIGAN, P.C.

By: _____

DANA G. KIRK*
State Bar No. 11507500
KENNETH B. COLE, JR.
State Bar No. 04544410
3900 One Shell Plaza
900 Louisiana
Houston, Texas 77002
(713) 228-7210

*Counsel of Record

Attorneys for Cross-Respondents

Of Counsel:

KIRK & CARRIGAN, P.C.